Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

THE STATE OF TEXAS,

Petitioner,

v.

ANDREW LEE MITCHELL,

Respondent.

Petition For Writ Of Certiorari To The Court Of Criminal Appeals For The State Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

(1) Did the Texas Court of Criminal Appeals err by vacating the respondent's capital murder conviction because the Smith County Sheriff's Department suppressed certain statements that were not favorable or material?

PARTIES TO THIS PROCEEDING

The names of the parties to this proceeding are as follows:

1. Jack Skeen, Jr., Criminal District Attorney, Smith County, Texas; Amy R. Blalock, Assistant Criminal District Attorney, Smith County, Texas, 403 Smith County Courthouse, Tyler, Texas 75702 (Petitioner).

2. Andrew Lee Mitchell, Texas Department of Criminal Justice, Smith County Jail, 206 East Elm Street, Tyler, Texas 75702 (Respondent).

3. Hon. David L. Botsford, Alvis, Carssow, Cummins, Hoeffner & Botsford, 100 Congress Avenue, Suite 1700, Austin, Texas 78701 (Attorney for Respondent).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Texas, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Criminal Appeals for the State of Texas entered in this proceeding on February 10, 1993.

OPINIONS BELOW

The opinions of the Court of Criminal Appeals of Texas are reprinted in the Appendix to this petition.

STATEMENT OF JURISDICTION

The opinion and judgment of the Court of Criminal Appeals were entered on February 10, 1993. A timely motion for rehearing of that decision was overruled on April 14, 1993. The decision to deny rehearing is reprinted in the appendix to this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a). This petition is timely filed pursuant to United States Supreme Court Rule 13.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The due process clause of the Fourteenth Amendment to the United States Constitution which provides that no person shall be deprived of life or liberty without due process of the law is involved in this case.

STATEMENT OF THE CASE

A. Statement of the Facts

Keith Wills came to Tyler, Texas to work for the Faith Temple Church (SF 212). As part of his work, he organized a project to support an orphanage in India (SF 212). Wills and the church established two firework stands in Smith County (SF 213). The money they raised from selling the fireworks went to the orphanage fund. On December 26, 1979, Wills began working at the stand at 5:00 p.m. (SF 214). When he began his shift, the cigar box

in which the money was kept contained approximately $150.00 (SF 215).[1]

On the night of December 26, 1979, Edward Earl Owens, Anthony DeWayne Mitchell and the respondent desperately needed money to buy heroin. At the time of trial, the respondent lived with his wife, their baby, and Anthony Mitchell, his son by another marriage (SF 87). Anthony is also known as Tony.

On the night of the murder, the respondent, Owens, and Tony left their residence in Tyler and drove around the county in the respondent's red Firebird (SF 88). The respondent drove the car the whole night (SF 100). Their first stop was in Arp, a small town in the southeastern part of Smith County. The three went to Kenneth "Red" Crawford's mobile home in Arp in an attempt to borrow money (SF 89). When they were unsuccessful in their endeavor to borrow money from "Red," the respondent asked "Red" if he knew anyone the respondent could rob because he needed money (SF 99). After some discussion of this matter, the three men eventually left "Red" in pursuit of someone to rob.

The trio cased several grocery and convenience stores for potential victims and even followed some of the store customers home in their attempt to find a victim (SF 372-373).

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[1] Ironically, Keith and Reverend Cunningham discussed the course of action they would take if robbers tried to rob the stand. Keith told Reverend Cunningham that if anyone tried to rob them, they should just give them the money and let them go (SF 214).

After making various other stops, the trio eventually went to the firework stand where Keith Wills was working. The first time the three went to the stand, they did not murder Keith. All three approached Keith under the pretense of inquiring about firecrackers (SF 105). They learned, during that encounter, that he would be at the stand all night (SF 106). Two teen-aged boys showed up to buy firecrackers, and the respondent left with his confederates (SF 379).[2]

The three men then went to Whitehouse, Texas, a small town less than ten (10) miles south of Tyler, where they saw Carl Ray Prentiss (SF 107). Owens sold his camera at Prentiss's house for fifteen dollars (SF 378). The men also saw Sam Martin. Owens tried to get Martin to buy his car, but Martin would not buy it (SF 108). Prentiss and Martin confirmed seeing the three men that night, although Owens was the only one they had met before that encounter (SF 182, 186).

The three then returned to Keith Wills's firework stand so they could "rob and kill Keith Wills" (SF 109).[3]

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[2] The two boys were Jeff and James Hammonds, brothers who purchased fireworks. Jeff identified the applicant and Tony. They said Keith Wills was nice to them (SF 194). They did not have quite enough money to purchase all the fireworks they wanted but Keith Wills allowed them to go ahead and take the firecrackers; the brothers were going to bring him the five cents that they owed him the next day (SF 204). Of course, they were not able to do that.

[3] There is some discrepancy between Owens and Tony regarding how many times the trio visited the fireworks stand. Owens testified they went to the stand twice, but Tony stated they went three times.

The respondent told his confederates that if he robbed Wills, he would also have to kill him to keep Wills from identifying him (SF 110). Once the three arrived at the stand, the two Mitchell men got out of the car while Owens remained in the car (SF 110-111). The Mitchells asked to buy fireworks, and as Wills reached to get the firecrackers, the respondent shot Wills in the back of the head (SF 111). The respondent shot Wills again right between the eyes. The gun the respondent fired was a Five Shot Charter Arm .38 Special (SF 128). Owens had obtained the gun from Ray Crawford, who had stolen it during a robbery (SF 128).

The respondent and his son then climbed into the firework stand and grabbed the money in the cigar box that was supposed to go to the orphanage in India, along with Wills' wallet and other items, and the two raced back to the car. The respondent made his son return to the stand because he thought he left Wills' wallet there, and he knew his fingerprints were on it (SF 112). After the respondent found the wallet, he called Tony back to the car and the three men left the scene (SF 113). The respondent's confederates indicated the incident occurred before 10:00 p.m.[4]

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[4] The time of the incident is the entire basis of the claim presented in the writ of habeas corpus. Ralph East, who was the game warden at the time, remembers telling one of the deputies working on the case that he passed the firework stand between 10:00 p.m. and midnight and noticed that a television was on and a man was sitting behind the counter. East never filed a written report regarding the matter. Deputy Kelly Stroud noticed around 12:15 a.m. that the firework stand was open and that an individual was sitting inside the stand. Deputy Stroud

As they were driving down the road, the respondent complained because he "had the son-of-a-bitch's blood" on his hands (SF 113). Owens asked the respondent if Keith Wills was dead and the respondent replied that he should be because he shot him right between the eyes. He also said that "white people" had been mistreating his "people", so the killing was just a "payback" (SF 114).[5] The respondent did not say that he was sorry for killing Keith Wills (SF 387). The respondent did tell Owens that if he told anyone about the murder, he would be just as dead as Keith Wills (SF 385).[6] The men discarded the cigar box, Keith's keys, the wallet and the bullet hulls (SF 114). The men wanted to go to another firework stand and rob it also, but that particular stand was closed (SF 116).

Once they returned to their Tyler home, Owens and Tony washed the car's interior to remove the traces of blood (SF 117). The respondent washed his clothes and bathed to remove the blood (SF 389). The men then went to the Alfreda Motel and the Savoy Club, where the respondent bought heroin and injected it into himself with a hypodermic needle (SF 119, 390). Hiawatha Lyles confirmed that the respondent was in the hotel that night, and that people were using heroin (SF 163). The respondent acted "like he was high" afterward (SF 391). The

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filed a written report which was never released to the defense attorneys or the prosecutors.

[5] The record reflects that the appellant is an African-American male, although he is very light-skinned (SF 114).

[6] The applicant referred to killing people as "fuck[ing]" people off (SF 556).

respondent also purchased another gun (SF 120). The money for the gun and the heroin came from the robbery and murder of Keith Wills (SF 120).

The respondent, Tony and Owens were arrested for the murder on January 10, 1979. When law enforcement authorities searched Mitchell's residence, they found stolen property in every room of the house (SF 442).[7]

Dr. V.V. Gonzalez, a pathologist who performed the autopsy on Keith Wills, testified that Wills had been shot twice. He was shot once behind his ear and once between the eyes (SF 287). Dr. Gonzalez testified that both shots were fired at close range (SF 288). A firearms examiner from the Dallas County Forensic Laboratories, Alan Jones, testified that one of the bullets removed from Keith Wills's head was a copper bullet fired from a .38 special caliber gun (SF 329). The other bullet that was removed was a lead bullet, and it had the same right-hand twist found in the other bullet fragments (SF 337). Because the bullets are made of different metals, Jones could not positively determine if both had been fired from the same gun (SF 337). No fingerprints could be lifted from the shells. Testimony at trial indicated that the respondent wiped off the shells before loading the gun.

The respondent was convicted of capital murder and sentenced to death.

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[7] Tony testified that the respondent, who had not been gainfully employed for years, encouraged him to rob and steal (SF 550, 555). In fact, the respondent discouraged Tony from working because he wanted Tony to help with his criminal activities (SF 557). The respondent did advise Tony, however, that he should not bring stolen property into the house (SF 555).

B. Course of Proceedings and Disposition in the Courts Below

The conviction and death sentence were initially affirmed in *Mitchell v. State*, 650 S.W.2d 801 (Tex. Crim. App. 1983). The Texas Court of Criminal Appeals, however, reversed itself this year and overturned the death sentence given to respondent because of a claim presented in a writ of habeas corpus. This decision was reached in *Ex parte Andrew Lee Mitchell*, No. 71,474 (Tex. Crim. App. 1992) (slip op.) (attached), where the court found that certain statements suppressed by the Smith County Sheriff's Department were both exculpatory and material. The State filed a motion for rehearing, which was denied on April 14, 1993 (attached).

REASONS FOR GRANTING THE WRIT

The Texas Court of Criminal Appeals found that certain statements suppressed by the Smith County Sheriff's Department were both exculpatory and material. The Court stated that its recent decision in *Thomas v. State*, 841 S.W.2d 399 (Tex. Crim. App. 1992) controls the resolution of this matter. *Thomas* was based on *Mooney v. Holohan*, 2944 U.S. 103 (1935), *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Bagley*, 473 U.S. 667 (1985), and *United States v. Agurs*, 427 U.S. 97 (1976).[8] The court used a three-

[8] The state court opinion cited federal opinions concerning nondisclosure of evidence. The state court opinion did not state that it was relying exclusively on state law. Therefore, it must be

part test to determine whether the State violated the respondent's rights to due process under the Fourteenth Amendment:

1) Has there been a failure to disclose evidence?

2) Is that evidence favorable to the accused?

3) Does that evidence create a probability sufficient to undermine the confidence in the outcome of the proceeding?

Thomas, supra at 405.

The Texas Court of Criminal Appeals concluded that the statements of Ralph East and Kelly Stroud were not disclosed by the Smith County Sheriff's Office either to the State or to the defense counsel in respondent's case, and that these statements were "material and favorable" to the defense. The Texas Court of Criminal Appeals however, misapplied the facts of the case to the law defining "material" and "favorable". The court vastly overrated the importance of the statements that were withheld from the attorneys. There was nothing in the statements that was favorable to the accused; nothing in the statements created a probability sufficient to undermine the confidence in the outcome of the proceeding.

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presumed that the Court's opinion rested on federal law. *Michigan v. Long*, 463 U.S. 1032 (1932).

THE STATEMENTS OF RALPH EAST AND KELLY STROUD WERE NOT FAVORABLE

The Texas Court of Criminal Appeals held that the statements of East and Stroud were exculpatory evidence and favorable to respondent. That Court also held that the evidence qualified as impeachment evidence. The statements of Ralph East and Kelly Stroud concern the time that the murder could have taken place. Owens testified that the three were at the Savoy Club after 10 p.m. Ralph East, a State Game Warden, testified at the Writ of Habeas Corpus hearing that he saw a person sitting at the firework stand between 10:00 p.m. and midnight the night of the murder. The lights of the stand were on and it appeared that a television was on. Kelly Stroud, a Smith County Deputy Sheriff, testified at the Writ of Habeas Corpus Hearing that he observed a person sitting at the same firework stand at 12:15 a.m. on December 27. Stroud filed a hand-written report later that same day, after he learned of Keith Wills' murder.

This evidence is not favorable to the respondent. Favorable evidence is any evidence that, "if disclosed and used effectively, may make the difference between conviction and acquittal." *United States v. Bagley*, 105 S.Ct. 3375, 3380 (1985). Favorable evidence includes both exculpatory and impeachment evidence. The reports that Keith Wills was still alive as late as 12:15 a.m. do not clear the respondent from any connection to the death; they only indicate that Owens and Tony did not know exactly what time they were at the firework stand. Owens and Tony never testified that the respondent killed Keith Wills at a certain time.

Further, this evidence offers little impeachment value. The defense could have prodded Owens and Tony about the time of the offense, but the two witnesses could have easily explained that they simply did not know what time the events transpired. When criminals are desperate enough to rob and kill a stranger so that they can have money for heroin, they do not always keep up with the time. Owens testified only that the group initially left the respondent's house when it was getting dark, around 5 or 6 o'clock in the evening. He also testified that the clock in the Savoy Club, where the three went after the murder, indicated that the time was after 10 o'clock in the evening. (SF 118). This clock could have been broken, or Owens could have misread it. The simple fact that he was wrong about the time does not indicate that his testimony about the murder was not credible.

THE STATEMENTS BY EAST AND STROUD WERE NOT MATERIAL; THEY DID NOT CREATE A PROBABILITY SUFFICIENT TO UNDERMINE THE CONFIDENCE IN THE OUTCOME OF THE PROCEEDING

The third part of the *Thomas* test requires that the court determine if the testimony of Stroud and East was material; that is, if their testimony creates a probability sufficient to undermine the confidence in the outcome of the proceeding. *Thomas* at 9. *See also United States v. Garcia*, 917 F.2d 1370, 1375 (5th Cir. 1990). This Court must examine the error in the context of the overall strength of the State's case. *Thomas, supra*. The Court may

also consider the effect of the nondisclosure on the preparation or presentation of the defendant's case. *Bagley, supra* at 3384.

This is where the respondent's case differs decisively from *Thomas*. In *Thomas*, the State suppressed evidence that a witness saw Thomas at the back of the building at the exact time the fatal shots were fired. Someone killed the victim in another part of the building. Thomas was somewhere else when the murder occurred. Two other witnesses testified that Thomas murdered the victim. The suppressed statements impeached the testimony of the two other witnesses, and it was exculpatory because Thomas could not have committed the murder when he was not at the scene of the murder at the time the shots were fired. This evidence truly casts doubt upon the guilty verdict.

In the present case, two eyewitnesses testified that the respondent shot Keith Wills twice. Unlike *Thomas*, there is no third witness to testify that the respondent was somewhere else when Wills was murdered. One of the witness's testimony indicates that he thought the murder had occurred before 10 o'clock in the evening because, in the motel where the three went to inject themselves with heroin after the murder, he saw a clock that indicated that the time was just a few minutes after 10 o'clock. The statements by Stroud and East do not give the respondent an alibi; they only make it doubtful that Owens, while concerning himself with the illegal activities occurring around him, observed the correct time. The other witness from the hotel, Lyles, did not testify what time the respondent and his confederates arrived on the night of the murder. The witnesses from the places

the respondent stopped before the murder gave only a very general description of the time involved. All the witnesses, however, confirmed that the three men were together on the night that Keith Wills was murdered.

The statements of Stroud and East do not negate the powerful testimony of Owens and Tony. The statements only indicate that Owens and Tony were unsure of the time. The three men made many stops on their journey the night of the murder; they obviously had nothing with which to measure the passing of time. An indiscrepancy in time does not exculpate the respondent nor does it create a probability that a guilty verdict was the wrong one. Although the statements were not disclosed, their substance and impact do not warrant a new trial. Furthermore, the Texas Court of Criminal Appeals held that there was sufficient evidence to corroborate the testimony of the accomplices, Owens and Mitchell. *Mitchell v. State*, 650 S.W.2d, at 804-809. Since other items of evidence supported the verdict, that there is a discrepancy in the time of the murder by a couple of hours is not significant to the case. This Court should grant this Petition for Writ of Certiorari to the Texas Court of Criminal Appeals and AFFIRM the sentence of death.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be granted in this case. The judgment of the Court of Criminal Appeals should be reversed and the case should be remanded to that court for further proceedings.

Respectfully submitted,

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APPENDIX "1"

Andrew Lee MITCHELL, Appellant,

v.

The STATE of Texas, Appellee.

No. 68915.

Court of Criminal Appeals of Texas,
En Banc.

April 27, 1983.

Rehearing Denied June 15, 1983.

Defendant was convicted before the 241st. Judicial District Court, Smith County, Glenn Phillips, J., of capital murder, and he appealed. The Court of Criminal Appeals, Onion, P.J., held that: (1) evidence independent of accomplice witnesses tended to connect defendant with the crime charged and was sufficient to corroborate the accomplice witness' testimony; (2) trial court did not err in refusing defendant's requested instruction on the corroboration of accomplice witness' testimony; (3) trial court did not err in instructing jury to disregard defense counsel's inquiry as to whether State's witness had been in jail "some 34 times," since it had been shown that the witness had been arrested approximately 34 times, but there was no evidence that he had ever been convicted of any offense; (4) trial court did not abuse its discretion in excluding from evidence a map of city where offense occurred, since defense witness who identified the map testified that he did not draw the map and did not know who did, that it was a copy, not an original, and that he did not know if it was drawn to scale, and since defendant did not show how the map would have aided or

clarified the witness' testimony or how it was relevant; and (5) evidence at guilt stage of trial was sufficient to support jury's affirmative finding as to the probability of future criminal acts of violence.

Affirmed.

Clinton, Teague and Miller, JJ., concurred in the result.

Motion for leave to file motion for rehearing denied.

Clinton, J., dissented to denial of motion for leave to file rehearing motion and filed opinion in which Teague and Miller, JJ. joined.

Curtis L. Owen, Tyler, for appellant.

Hunter B. Brush, Dist. Atty. and Ruth J. Blake, Asst. Dist. Atty. Tyler, Robert Huttash, State's Atty. and Alfred Walker, Asst., State's Atty., Austin, for the State.

Before the court en banc.

OPINION

ONION, Presiding Judge.

This is an appeal from a conviction for capital murder. V.T.C.A., Penal Code, § 19.03. After the jury affirmatively answered the special issues submitted pursuant to Article 37.071(b)(1) and (b)(2), V.A.C.C.P., the court assessed punishment at death. V.T.C.A., Penal Code, § 12.31.

At the outset the appellant contends that the evidence is insufficient to corroborate the two accomplice witnesses, his son, Anthony DeWayne Mitchell, and

Edward Earl Owens, as required by Article 38.14, V.A.C.C.P., and thus the conviction cannot stand.

Omitting the formal parts, the indictment alleged that on or about December 26, 1979, in Smith County, the appellant "did then and there intentionally and knowingly cause the death of Keith Wills by shooting him with a pistol; and the said Andrew Lee Mitchell did then and there intentionally cause the death of the said Keith Wills in the course of committing the felony offense of robbery upon the said Keith Wills. . . . "

The record shows that Keith Wills, a young man,[1] was operating a fireworks stand outside of Troup on December 26, 1979. The money raised was to be used for a [sic] orphanage in India. He relieved Alva Cunningham, a minister at the Faith Temple Church, at the stand about 5 p.m. Wills was left with $150.00 and some change in a cigar box to conduct business. He apparently planned to operate the stand all night. He was placed at the stand about 8 p.m. by other than the accomplice witnesses.

About 8 a.m., December 27, 1979, 15-year-old Steven Oaks went to the fireworks stand. He saw a man lying on the floor of the stand who had been shot. A television set was on. Oaks returned home and told his father, who said it was a prank. Later, when he saw a crowd around the stand, he stopped and talked to the deputy sheriff.

Potsy Sanders and her son went to the fireworks stand about 9 a.m. on December 27, 1979, and found a

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[1] Wills' age does not appear to be reflected by the record. He is only described as a young man.

man dead on the floor. He had been shot. They reported it to the police.

The body was identified as that of Keith Wills. Dr. V.V. Gonzales performed an autopsy at 2:30 p.m. on December 27, 1979. He found a wound behind the ear in the upper part of the neck. Tracing the course of the bullet, he stated he found a .32 caliber bullet inside the brain. Another wound was above the nose and between the eyes. There was a penetrating wound into the cranial cavity. A fragmented bullet was removed. The doctor could not identify the caliber of this fragment. There were powder burns around both wounds indicating shots at close range. The cause of death was pistol gunshot wounds to the brain, either of which would have been fatal.

Twenty-four-year-old Edward Earl Owens lived at appellant's house in Tyler with appellant, his wife, and appellant's 18-year-old son, Anthony DeWayne Mitchell. Owens and the son testified for the State. Owens had been granted immunity and the younger Mitchell had been promised 10 years' punishment, probated. From their testimony, it was clear that they were accomplice witnesses as a matter of law.

With the exception of a few minor details, their testimony was generally the same. These accomplice witnesses revealed that in the company of the appellant they left appellant's Tyler residence in the early evening hours of December 26, 1979. Appellant was driving his wife's red Firebird automobile. They had with them "a Five Shot Charter arm pistol, a 38 Special," a .30-30 Winchester rifle, and a .12 gauge riot shotgun.

First they went to Kenneth Crawford's mobile home near Arp. While there appellant asked Crawford if he knew someone appellant could rob as he (appellant) "had to have some money."[2] When the three left Crawford, they drove to a supermarket in Arp. They abandoned robbery plans there because of the number of people in the store. They did follow two people leaving the store in a car, but abandoned that when it became apparent they were being observed from the other car.

Appellant, his son and Owens then drove to Troup and proceeded to a store there. They abandoned robbery plans there when it appeared possible someone was in the back watching events in the store.

The three drove to the Kity Korner store in Troup. Appellant and Owens entered the store. The store's operator and appellant engaged in conversation about trading firearms. No trade took place. The three then drove to the fireworks stand near Troup where the deceased worked. Appellant purchased some fireworks and asked how late the stand would be open in case he had to return any of the fireworks. He was told the stand would be open all night.

According to Owens they then drove to Whitehouse where they encountered Carl Prentiss, who led them to Sam Martin's house. Owens wanted to see if Martin was

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[2] Owens related the discussion was between appellant and Crawford. The son testified all four discussed robbing an elderly couple with a coin collection, but decided against it because their son was home from college for the holidays.

still interested in his car, which he wanted to sell. According to Owens, after talking to Martin, they returned to the fireworks stand near Troup.[3] The express purpose of all three men was to rob the stand's operator. The accomplice witnesses related appellant stated the operator had to be killed to keep him from identifying them.

Appellant and his son approached the stand and asked the operator for bottle rockets. Owens stayed near the car, apparently as a lookout. Appellant was armed with the .38 cal. pistol covered by a towel or cloth. As the operator, later identified as Wills, turned to get the requested fireworks, appellant shot the operator in the neck at close range and jumped over the counter. His son followed. The pistol misfired, which was a common problem with the weapon. Appellant finally shot the deceased a second time. They took a cigar box with bills and change, the deceased's wallet and car keys. When Owens asked if the "guy" was dead, the appellant replied that he should be as he had been shot between the eyes. They then drove along the Mixon Road. Appellant took the $100.00 that was in the cigar box and the change was placed in the car's console. They stopped and Owens buried the two .38 cal. bullet hulls and appellant's son disposed of the cigar box and keys, etc. They discussed committing a robbery at a Bullard fireworks stand, but upon arrival they found the stand closed. They returned to appellant's house in Tyler where appellant washed his

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[3] Appellant's son testified that they went to Whitehouse prior to going to the fireworks stand the first time and also differed with Owens' testimony as to how many times they visited the fireworks stand before the killing.

clothes to remove blood and the two accomplice witnesses cleaned the interior of the car.

Owens and appellant's son went to the Savoy Club in Tyler and later went to the room appellant had at the nearby Alfreda Motel. Appellant had purchased heroin with some of the money taken in the robbery. He, Owens, and several others were "shooting" the heroin. It appears appellant also bought a gun for $40.00 for his son from a Don Walker, who was at the motel room.

Jack Harless testified he was operating the Kity Korner store in Troup on December 26, 1979. Between 7:30 or 8:30 p.m. two men entered the store, one large and one a smaller man. His description fit the appellant and Owens. The big man discussed a trade of firearms with Harless and showed him a .30-.30 cal. Winchester rifle. No trade was consummated. The big man asked if Harless could repair a pistol which often misfired, and Harless requested to see the weapon. The big man left to get the pistol, but returned to say he had forgotten he had left it at home. As the two men were leaving the store, David Sutton entered and spoke to the larger man.

Sutton identified appellant as being in the Kity Korner store on the evening of December 26. On cross-examination he admitted he could not recall the exact date he had seen appellant in Troup, but it was during the holiday season.

Jeff Hammonds, 13 years old, testified he and his older brother, James, had gone to Troup about 7:45 p.m. on December 26, 1979. Jeff noticed a red Firebird because it was loud and because of his interest in sports cars. On the way home the brothers stopped at the fireworks stand

outside of Troup and saw the red Firebird there with three people in it.

Jeff described the men and identified a photograph of the appellant and a photograph of his son as two of the men he saw at the fireworks stand.

James identified a photograph of appellant's son and generally corroborated his brother's testimony. The Hammonds brothers established that Wills was alive around 8 p.m. on the night in question.

Carl Prentiss testified that he saw Owens in Whitehouse on December 26, 1979 with two other men, whom he could not identify. He led them to Sam Martin's residence at Owens' request.

Sam Martin testified that on that day Owens came to see him between 7:30 to 8:30 p.m. and discussed selling a car. He observed Owens was in a red car, but he could not identify appellant as being in the car.

Hiawatha Lyles, Jr., testified around Christmas time 1979 he was in a room at the Alfreda Motel with the appellant, the two accomplice witnesses and other persons. He revealed heroin was available in the room and that appellant's son looked at a gun being sold by Don Walker.

Ray High testified that on January 8, 1979, he happened to be at appellant's house in Tyler and observed on a night stand in appellant's bedroom a blue steel gun which he believed to be "a .38." About January 8, 1979, appellant and Owens went with him to Jacksonville. Upon their return trip to Tyler he stopped the truck to relieve himself, and while doing so, he heard and saw

appellant fire a shot from a gun and heard Owens and appellant discussing the fact the hull of the bullet had stuck in the gun's chamber.

Walter Woodhull, Smith County deputy sheriff, related he obtained a statement from Owens on January 10, 1980. Owens took him to two different locations to recover physical evidence. Two .38 cal. cartridge hulls, the cigar box and personal items belonging to the deceased were recovered.

Woodhull had attended the autopsy on the deceased performed by Dr. Gonzales and testified he received from the doctor "a copper jacket, number .38 caliber slug and the lead slug from the .38 caliber and lead fragments," which were recovered from the deceased's body. The chain of custody of such items was traced to Allan Jones, a firearm expert at Dallas County Forensic Laboratories.

Jones testified the items taken from the deceased's body had been fired by a .38 caliber gun, either a Ruger or an R G or a Charter Arm weapon. The particular type of ammunition was not available "in a .32 caliber," but it would be easy for someone to mistake the type as that of a lower caliber than a .38 caliber.[4] Jones was unable to make a positive association of any of the fragments removed from the deceased and the two .38 cal. cartridge hulls found along the Mixon Road at Owens' direction.

Turning now to appellant's contention, we observe that Article 38.14, V.A.C.C.P., provides:

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[4] See Dr. Gonzales' testimony earlier noted.

> "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense."

In *Edwards v. State*, 427 S.W.2d 629 (Tex.Cr.App.1968), this court wrote:

> "The test as to the sufficiency of the corroboration is to eliminate from consideration the evidence of the accomplice witness and then the [sic] examine the evidence of other witnesses with the view to ascertain *if there be inculpatory evidence, that is evidence of incriminating character which tends to connect the defendant with the commission of the offense.* If there is such evidence, the corroboration is sufficient; otherwise, it is not. *Dalrymple v. State*, Tex.Cr.App., 366 S.W.2d 576; *Bradford v. State*, 170 Tex.Cr.R. 530, 342 S.W.2d 319." (Emphasis supplied.)

See also *Odom v. State*, 438 S.W.2d 912 (Tex.Cr.App.1969); *Cherb v. State*, 472 S.W.2d 273 (Tex.Cr.App.1971); *Reynolds v. State*, 489 S.W.2d 866 (Tex.Cr.App.1972); *James v. State*, 538 S.W.2d 414 (Tex.Cr.App.1976); *Etheredge v. State*, 542 S.W.2d 148 (Tex.Cr.App.1976); *Nelson v. State*, 542 S.W.2d 175 (Tex.Cr.App.1976); *Loa v. State*, 545 S.W.2d 837 (Tex.Cr.App.1977); *Dillard v. State*, 550 S.W.2d 45 (Tex.Cr.App.1977).

In applying the test of the sufficiency of the corroboration, each case must be considered on its own facts and circumstances – on its own merit. *Etheredge v. State*, supra; *O'Donald v. State*, 492 S.W.2d 584 (Tex.Cr.App.1973); *Barnett v. State*, 163 Tex.Cr.R. 270, 290 S.W.2d 234

(Tex.Cr.App.1956); *McCarty v. State*, 144 Tex.Cr.R.408, 163 S.W.2d 200, 202 (Tex.Cr.App.1942). See also 23 C.J.S. CrimLaw, § 812(6), p. 134; *Forbes v. State*, 513 S.W.2d 72 (Tex.Cr.App.1974), cert. den. 420 U.S. 910, 95 S.Ct. 830, 42 L.Ed.2d 840.

All the facts and circumstances in evidence may be looked to as furnishing the corroboration necessary. *Washburn v. State*, 167 Tex.Cr.R. 125, 318 S.W.2d 627, 634 (Tex.Cr.App.1958), cert. den. 359 U.S. 965, 79 S.Ct. 879, 3 L.Ed.2d 834; *Brown v. State*, 561 S.W.2d 484 (Tex.Cr.App.1978). The corroborative evidence may be circumstantial or direct. 23 C.J.S., Crim.Law, § 8.2(3), f. 107 (note 51 with a host of Texas cases cited); *Brown v. State*, supra. The combined cumulative weight of the incriminating evidence furnished by the non-accomplice witnesses which tends to connect the accused with the commission of the offense supplies the test. *Perkins v. State*, 450 S.W.2d 855 (Tex.Cr.App.1970); *Windham v. State*, 479 S.W.2d 319 (Tex.Cr.App.1972); *Colunga v. State*, 481 S.W.2d 866 (Tex.Cr.App.1972). It is not necessary that the corroboration directly link the accused to the crime or be sufficient in itself to establish guilt. *Attwood v. State*, 509 S.W.2d 342 (Tex.Cr.App.1974); *Reynolds v. State*, 489 S.W.2d 866 (Tex.Cr.App.1972); *Rainey v. State*, 401 S.W.2d 606 (Tex.Cr.App.1966); *Washburn v. State*, supra. Apparently insignificant circumstances sometimes afford most satisfactory evidence of guilt and corroboration of the accomplice witness' testimony. *Holmes v. State*, 70 Tex.Cr.R. 423, 157 S.W. 487 (Tex.Cr.App.1913).

In *Reynolds v. State*, supra, it was said:

> "The corroborative testimony need not directly link the accused to the crime or be sufficient in itself to establish his guilt. Otherwise, the testimony of the accomplice would be valueless. The corroborative evidence is sufficient if it tends to connect the accused with the crime, and it is the cumulative weight of such evidence which supplies the test." See also *Minor v. State* [108 Tex.Cr.R. 1] 299 S.W. 422 (Tex.Cr.App.1927).

In the instant case the accomplice witnesses made out a complete case against the appellant. Without the requirements of Article 38.14, supra, there could be no question as to the sufficiency of the evidence to sustain the jury's verdict. Applying Article 38.14, supra, as we are required to do, and the test of sufficiency of the corroboration as discussed in *Edwards v. State*, supra, we must look to the non-accomplice witnesses' testimony.

Article 38.14, supra, expressly provides that evidence merely showing the commission of an offense is not sufficient alone to corroborate an accomplice witness. *Nelson v. State*, 542 S.W.2d 175 (Tex.Cr.App.1976); *Anders v. State*, 501 S.W.2d 665 (Tex.Cr.App.1973); *Reynolds v. State*, supra; *Colunga v. State*, supra; 24 Tex.Jur.2d, Evidence, § 694, p. 326. However, it is a factor to be considered along with other possible factors in determining whether there is sufficient independent evidence to corroborate the accomplice witness. The independent evidence in this case shows that the deceased, who operated a fireworks stand, was twice shot in the head while at the stand at night and money in a cigar box and personal items were

taken. Such evidence shows a murder by someone apparently in the course of a robbery.

It has been held that it may be shown in corroboration that the accomplice witness and the accused were intimate associates. *Brunett v. State*, 144 Tex.Cr.R. 244, 26 S.W.2d 208 (Tex.Cr.App.1930). In 23 C.J.S., Crim.Law, § 812(4)(g), pp. 119-120, it was written, however, that " . . . it has been held not sufficient corroboration merely to show *generally* the accused was an associate of the accomplice at a time antecedent to the commission of the crime, or that they were together shortly before or shortly after the commission of the crime." (Emphasis supplied.) See also *Cherb v. State*, supra; *Moore v. State*, 521 S.W.2d 263 (Tex.Cr.App.1975); *Lyman v. State*, 540 S.W.2d 711 (Tex.Cr.App.1976). See also *Ayala v. State*, 511 S.W.2d 284 (Tex.Cr.App.1974). The presence of the accused with the accomplice witness, however, may when coupled with the other circumstances be sufficient to corroborate the testimony of the accomplice witness. *Nelson v. State*, 542 S.W.2d 175 (Tex.Cr.App.1976); *Dillard v. State*, 550 S.W.2d 45 (Tex.Cr.App.1977); *Moore v. State*, supra; *Cherb v. State*, supra.

Evidence which *merely* goes to show motive or opportunity of the accused to commit the crime is insufficient to corroborate the accomplice witness, although it may be considered in connection with other evidence tending to connect the accused with the crime. *Reynolds v. State*, supra; 23 C.J.S., Crim.Law, § 812(4), p. 111; *Rogers v. State*, 461 S.W.2d 399 (Tex.Cr.App.1970).

The two young accomplice witnesses testified they lived with the older appellant. The independent evidence

showed they were close associates with the appellant before and after the alleged offense. The independent evidence showed the accomplice witnesses were together with the appellant shortly before and shortly after the alleged offense. The testimony of Harless and Sutton placed appellant at a store in Troup on the very evening in question. Harless said appellant showed him a 30-30 cal. Winchester rifle which the accomplice witnesses said they had taken with them on December 26th. Appellant also asked Harless about repair repairing a misfiring pistol, but later claimed he left it at home. The accomplice witnesses revealed that the .38 cal. pistol they had that night had a habit of misfiring.

Jeff Hammonds identified appellant and his son as two of the three men he saw in a red Firebird and at the fireworks stand outside of Troup at 8 p.m. on December 26th. He heard the appellant asking the man operating the stand how long the business would be open that night. James Hammonds testified to essentially the same facts. This corroborated the testimony of the accomplice witnesses as to what occurred on their first trip to the stand.

The accomplice witnesses stated appellant shot the deceased with the Charter Arm .38 cal. pistol. The son related the pistol misfired before and after the second shot. The bullet slug and fragments taken from the deceased's body were shown by independent evidence to have been .38 cal. ammunition that could have been fired by a .38 cal. Charter Arm weapon. Ray High saw a .38 cal. weapon on a night stand in appellant's bedroom in early January, 1980, and later on a trip saw appellant shoot a

gun and complain about the shell hull sticking in the gun chamber.

Owens could not see what happened after appellant first shot the deceased in the neck and jumped over the counter. He later heard a second shot. Upon leaving the scene, Owens asked if the man was dead, and appellant informed him he had shot the man between the eyes. Dr. Gonzales testified one of the two wounds was between the eyes.

Without detailing further facts, we observe that the court charged the jury on the law of accomplice witnesses and that Owens and appellant's son were accomplice witnesses as a matter of law. Viewing the evidence in the light most favorable to the jury's verdict and the rules discussed above, we conclude that the evidence independent of the accomplice witnesses tends to connect the appellant with the crime charged and is sufficient to corroborate the accomplice witnesses' testimony.

Appellant also urges the court erred in failing to sufficiently charge on the corroboration of the accomplice witness' testimony.

The court charged on the law of accomplice witnesses. See Article 38.14, V.A.C.C.P. The charge is in many respects similar to the charge found sufficient in *Dillard v. State*, 550 S.W.2d 45 (Tex.Cr.App.1977), and it further instructed that the accomplice witnesses could not corroborate each other.

Appellant's requested charge (Article 36.15, V.A.C.C.P.) in its first paragraph was similar to the language of Article 38.14, supra, and to the charge actually

given. The second paragraph requested an instruction that mere presence of a defendant in company of the accomplice witnesses was not in itself sufficient corroboration of the testimony of the accomplice witnesses. The requested charge was denied by the court, although the charge on accomplice witness testimony did not include a "mere presence" charge. The rule is that mere presence of the accused in the company of an accomplice witness shortly before or after the time of the offense is not, in itself, sufficient corroboration of the accomplice witness' testimony. *Moore v. State*, 521 S.W.2d 263 (Tex.Cr.App.1975). However, presence of the accused with an accomplice witness when coupled with other circumstances, may be sufficient corroboration. *Cherb v. State*, 472 S.W.2d 273 (Tex.Cr.App.1971). If the testimony raised the defensive theory of mere presence, appellant was entitled to his requested charge. *McShane v. State*, 530 S.W.2d 307 (Tex.Cr.App.1975); *Dillard v. State*, supra.

The State argues that the court charged the jury under the law of parties that mere presence alone will not make a person a party to an offense, and that the charge should be read as a whole, and when it is, appellant's rights were adequately protected and there is no reversible error. *Gonzales v. State*, 466 S.W.2d 772 (Tex.Cr.App.1971), and *Dabbs v. State*, 507 S.W.2d 567 (Tex.Cr.App.1974), are cited.

Be that as it may, the appellant did not testify and the evidence did not raise the defensive theory of mere presence. No reversible error is presented. *Dillard v. State*, supra, at p. 51; *Bilbrey v. State*, 594 S.W.2d 754, 756 (Tex.Cr.App.1980). Appellant's contention is overruled.

Appellant contends the court reversibly erred in denying his counsel the right of effective cross-examination of Edward Owens.

The State's motions in limine to prevent appellant from inquiring into Edward Owens' prior criminal record and arrests were heard by the court, which ruled that no act of misconduct would be mentioned until the admissibility of such misconduct could be determined in the jury's absence. Nevertheless, on cross-examination appellant inquired if Owens had been in jail "some 34 times." The jury was instructed to disregard the question. A bill of exception was perfected. It showed that Owens had been arrested approximately 34 times but no evidence he had ever been convicted of any offense.

There was nothing to show that appellant was entitled to impeach Owens under the provisions of Article 38.29, V.A.C.C.P. Appellant cites *Simmons v. State*, 548 S.W.2d 386 (Tex.Cr.App.1977), and urges great latitude should have been allowed him to show ill will, bias, motive and animosity by any witness against him. It was shown that Owens had been granted immunity with regard to the instant offense, and there was nothing to show that any of the arrests were related to the appellant or the instant offense in any way as to show the possibility of ill will, bias, motive and animosity, etc. The contention is overruled.

Appellant advances the contention the court erred in excluding from evidence a map of the city of Troup offered as a defensive exhibit.

Leroyce Jones, called by the defense, stated he had been an investigator for 20 years. He identified defense

Exhibit No. 4 as a city map of Troup. On voir dire examination he testified he did not draw the map and did not know who did, that it was a copy, not an original, did not know whether it was drawn to scale. He did not live in Troup. The court sustained the objection to the introduction of the map. Appellant offered it as part of a bill of exception. He does not point out what information he was deprived of presenting to the jury. He does not show how it would have aided or clarified Jones' testimony or how it was relevant. He cites no authority, but argues any inaccuracies went to the weight of the evidence rather than the map's admissibility. As a general rule maps, plats and diagrams must be properly authenticated and shown to be accurate before they can be admitted. *Popplewell v. City of Missouri*, 342 S.W.2d 52 (Tex.Civ.App.1960). We do not find the court abused its discretion. Appellant's contention is overruled. See 2 Ray, Texas Evidence, 3rd Ed., § 1465, pp. 144-145.[5]

In another ground of error appellant contends the court erred in receiving prejudicial opinion testimony.

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[5] In 2 Ray, Texas Evidence, 3rd Ed., § 1465, pp. 144-145, it is written:

> "The normal practice is for the map or model to be identified by a witness verified by him as being a correct representation of the thing in question and then introduced in evidence as a part of the testimony of the witness. Of course the visual aid used must be relevant to some issue. Beyond that, however, the admissibility of particular aids is wisely left to the discretion of the trial judge." Cf. *Roderiquez v. State*, 32 Tex.Cr.R. 259, 22 S.W. 978 (1893); *Bullock v. State* [73 Tex.Cr.R. 419] 165 S.W. 196 (Tex.Cr.App.1914).

Appellant claims the State introduced evidence he was a "suspect" prior to his arrest on January 10, 1980.

Deputy sheriff Woody Woodhull testified as to his investigation of the alleged offense and the recovery of certain exhibits with the aid of Owens. He was asked whether prior to January 1, 1980 he had "any suspects." General objections as to any testimony as to "suspects" was overruled. The record then reflects the following direct examination:

> "Q Did the names Tony Mitchell and Andrew Mitchell and Edward Owens come up regarding this case prior to January, 1980?
>
> "A Yes, sir. They did."

Appellant argues this testimony was equivalent to an expression of Woodhull's opinion of his guilt, and expression of opinion of a defendant's guilt constitutes reversible error. We cannot agree. Further, there was no objection on the grounds now urged, and because of the variance complaint on appeal need not be considered. *Seals v. State*, 634 S.W.2d 899, 909 (Tex.Cr.App.1982); *Bouchillon v. State*, 540 S.W.2d 319 (Tex.Cr.App.1976). Still further, the general objections urged at trial were not sufficient to perserve [sic] error, if any.

Appellant's ground of error is overruled.

Appellant in a pro se supplemental brief contends the evidence is insufficient to sustain the allegation in the indictment that he killed the deceased "by shooting him with a pistol."

Owens and appellant's son testified when they left home with appellant on the night in question they had

with them a .38 cal. pistol, and that appellant later shot the deceased with the pistol. This testimony, when coupled with that of Dr. Gonzales and the firearm expert Jones, clearly shows that appellant's contention is without merit.

Appellant argues the court erred in admitting evidence of extraneous offenses.

The appellant lists four extraneous offenses admitted during Owens' testimony and three extraneous offenses admitted during the testimony of appellant's son.

This ground of error is multifarious and does not comply with Article 40.09, § 9, V.A.C.C.P. Nothing is presented for review. *Sierra v. State*, 476 S.W.2d 285 (Tex.Cr.App.1971); *Beam v. State*, 500 S.W.2d 802 (Tex.Cr.App.1973); *Elizalde v. State*, 507 S.W.2d 749 (Tex.Cr.App.1974).

We observe that appellant contends Owens was permitted to testify that appellant and Kenneth Crawford talked about robbing someone who had a coin collection, and that he and appellant talked of robbing and killing at a fireworks stand in Bullard. He also contends appellant's son, Anthony Mitchell, was permitted to relate that Owens and appellant talked about the possible coin collection robbery, and that appellant and Owens discussed committing a robbery at the Kity Korner store in Troup. This testimony related not to offenses committed but only discussions of possible robberies which occurred after appellant, his son and Owens left home on December 26, 1979 and occurred prior to and after the alleged offense and before their return to Tyler.

Appellant also complains that Owens and the younger Mitchell were permitted to testify that soon after their return to Tyler he used the fruits of the crime to purchase heroin and was shooting heroin in a motel room.

It is well settled that where one offense or transaction is one continuous episode or another offense or transaction is a part of the case on trial or blended or closely interwoven therewith, proof of all the facts is proper. *Taylor v. State*, 420 S.W.2d 601, 605 (Tex.Cr.App.1967); *Tinsely v. State*, 461 S.W.2d 605 (Tex.Cr.App.1970); *Jones v. State*, 505 S.W.2d 909 (Tex.Cr.App.1974); *Johnson v. State*, 510 S.W.2d 944, 948 (Tex.Cr.App.1974); *Freeman v. State*, 556 S.W.2d 287 (Tex.Cr.App.1977); *Archer v. State*, 607 S.W.2d 539, 542 (Tex.Cr.App.1980).

In *Archer*, supra, this court wrote:

> "Such an extraneous offense is admissible to show the context in which the criminal act occurred; this has been termed the 'res gestae,' under the reasoning that events do not occur in a vacuum and that the jury has right to hear what occurred immediately prior to and subsequent to the commission of that act so that they may realistically evaluate the evidence. *Albrecht v. State*, 486 S.W.2d 97, Tex.Cr.App. [1972]"

Appellant also contends the court erred in permitting Owens to testify that the pistol with which the appellant shot the deceased had been acquired by him (Owens) from Kenneth Crawford, who had obtained the weapon in a burglary. The evidence revealed an extraneous offense committed by a third party which was not shown to have involved the appellant.

Appellant's contentions are overruled.

Appellant further urges that the trial court's charge on extraneous offenses was insufficient. The court gave a limiting charge as to extraneous offenses. Appellant now for the first time contends the court should have additionally charged that the testimony of the accomplice witnesses concerning such extraneous offenses had to be corroborated by independent evidence. No objection nor requested charge having been presented, no reversible error is presented.

Appellant makes claim that the evidence is insufficient to support the affirmative finding at the penalty stage of the trial as to Special Issue No. 2 as to the probability of future criminal acts of violence.

In addition to the evidence at the guilt stage of the capital murder case, the State offered evidence of appellant's 1971 conviction in federal court for conspiracy to possess a destructive device called a Molotov cocktail, and introduced the testimony of law enforcement officers that appellant's reputation for being a peaceable and law-abiding citizen was bad. Appellant's son was recalled. He testified his father had not had a job in the last four or five years, and that about April, 1979 he and his father left Tyler for a number of months because of his father's fear of some sealed indictments. They travelled in Texas and Oklahoma, and he supported himself by stealing motorcycles and robbing dope dealers. The son related the appellant was involved in a robbery in Dallas in which drugs were taken. On another occasion in Dallas he and his father stole a tractor-trailer rig. He admitted that during this time he would steal government checks out of mail boxes and cash them. He explained that his father would not allow him to participate in the robbery

of dope dealers which he (appellant) committed. He told of being sent by his father to commit a robbery at a beauty salon in Athens, but he panicked and ran. As punishment his father made him commit another robbery. The son also stated he tried to get his father to quit his use of illegal drugs.

It is well established that the circumstances of the offense itself can sustain an affirmative answer to the second special issue under Article 37.071, supra, if they are severe enough. *King v. State*, 631 S.W.2d 486 (Tex.Cr.App.1982); *Brooks v. State*, 599 S.W.2d 312 (Tex.Cr.App.1979); *Muniz v. State*, 573 S.W.2d 792, 795 (Tex.Cr.App.1978). The jury, at the penalty stage of the trial, may consider all of the evidence adduced at the guilt stage of the trial. *Russell v. State*, 598 S.W.2d 238, 254 (Tex.Cr.App.1980); *O'Bryan v. State*, 591 S.W.2d 464 (Tex.Cr.App.1979); *Duffy v. State*, 567 S.W.2d 197 (Tex.Cr.App.1978); *Felder v. State*, 564 S.W.2d 776 (Tex.Cr.App.1978); *Brock v. State*, 556 S.W.2d 309 (Tex.Cr.App.1977); *Moore v. State*, 542 S.W.2d 664 (Tex.Cr.App.1976). Indeed the circumstances of the offense and the facts surrounding it may furnish greater probative evidence than any other evidence regarding the second special issue submitted at the penalty stage of a capital murder case. *Duffy v. State*, supra, and cases there cited; *Crawford v. State*, 617 S.W.2d 925, 933 (Tex.Cr.App.1980).

When the facts of the instant offense are considered with the additional evidence adduced as appellant's reputation, prior criminal record and activities, we conclude the evidence is clearly sufficient to support the jury's finding of "yes" as to the said second special issue.

Appellant acknowledges that this court has held that unadjudicated extraneous offenses are admissible without the necessity of a prior conviction at the penalty stage of a capital murder case because such evidence is relevant to punishment, and that these unadjudicated extraneous offenses can be proven by the uncorroborated testimony of an accomplice witness. *May v. State*, 618 S.W.2d 333 (Tex.Cr.App.1981). Appellant asks that we re-evaluate our prior decisions including *May*. This we decline to do.

It is true that there was no psychiatric testimony, but it is not essential to support an affirmative finding to the second special issue in a capital murder case. *Brooks v. State*, supra; *Freeman v. State*, 556 S.W.2d 287 (Tex.Cr.App.1977); *Burns v. State*, 556 S.W.2d 270 (Tex.Cr.App.1977).

Appellant's ground of error is overruled.

The judgment is affirmed.

CLINTON, TEAGUE and MILLER JJ., concur in the result.

Before the court en banc.

OPINION DISSENTING TO DENIAL OF APPELLANTS MOTION FOR LEAVE TO FILE A MOTION FOR REHEARING

CLINTON, Judge.

In *May v. State*, 618 S.W.2d 333 (Tex.Cr.App.1981), according to the opinion of the Court, a majority rejected the assertion that "the provisions of Art. 38.14, [V.A.C.C.P.] are applicable to the extraneous offenses

offered in evidence at the punishment stage" of a capital murder case, *id.*, at 341. The Court concluded:

> "We hold that evidence offered to prove the special issues of Art. 37.071, supra, is not included within the provisions of Art. 38.14, supra. *Therefore*, the 'yes' answers to the special issues of Art. 37.071, supra, are supportable on the relevant accomplice witnesses' testimony concerning the appellant's prior criminal conduct and the court did not err in failing to submit an 'accomplice witness' charge at the punishment stage of the trial." *Id.*, at 343. [Emphasis added]

However, the conclusion reached by the *May* opinion does not rule out a constitutional attack on the use of such testimony to show "a reasonable probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," Article 37.071(b)(2), V.A.C.C.P.

"An accomplice witness is a discredited witness;"[1] practically from the beginning the courts of this State have so regarded such a witness.[2] So much so that "the settled law in this state [is that] when evidence of collateral crimes is introduced for one of the various purposes for which such evidence becomes admissible, the jury should be instructed that they cannot consider against the defendant such collateral crimes, unless it has been shown to their satisfaction that the accused is guilty thereof," *Lankford v. State*, 93 Tex.Cr.R. 442, 248 S.W. 389

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[1] *Cast v. State*, 164 Tex.Cr.R. 3, 296 S.W.2d 269, 271 (Tex.Cr.App.1956).

[2] See cases annotated under Article 38.14, n. 54.

(1923), quoted approvingly in *Wells v. State*, 118 Tex.Cr.R. 355, 42 S.W.2d 607, 608-609 (1931).

Now that we have the bifurcated trial procedure it would seem to follow that due course of law would also demand that testimony of an otherwise discredited witness purporting to report extraneous offenses on the part of the accused be similarly treated, examined and evaluated. In a capital case the question is at least important enough to look into.

Accordingly, I would grant leave to file for that purpose. Because the majority do not, I respectfully dissent.

TEAGUE and MILLER, JJ., join.

APPENDIX "2"

EX PARTE ANDREW LEE MITCHELL Habeas Corpus Application

NO. 71,474 from SMITH County

OPINION

This is an application for writ of habeas corpus that was transmitted to this Court pursuant to the provisions of TEX.CODE CRIM.PROC.ANN.Art. 11.07. This Court abated the matter and ordered the trial court to hold an evidentiary hearing and to transcribe the voir dire of applicant's trial. The trial court held two weeks of evidentiary hearings, and then made findings of fact and conclusions of law. The completed record was then transmitted to this Court, along with the trial court's recommendation that all relief be denied.

This Court set the application for submission to decide whether applicant's right to due process was violated by the State's suppression of exculpatory and material information which was within its possession. U.S.CONST. AMEND.XIV. This Court finds that the suppressed statements of Ralph East and Kelly Stroud were both exculpatory and material. Accordingly, we grant relief.

In February, 1981, applicant was convicted of committing the capital murder of Keith Wills on December 26, 1979. TEX.PENAL CODE ANN. §19.03(a)(2). This Court affirmed the conviction on direct appeal. Mitchell v. State, 650 S.W.2d 801 (Tex.Cr.App. 1983). At trial, the State proved, mostly through the testimony of applicant's two

accomplices[1], that Keith Wills was murdered at approximately 9:00 p.m. on the 26th. The accomplices testified that sometime around 8:30 p.m. on the night of December 26th, applicant Owens and Mitchell went to a fireworks stand on Highway 110 between Troup and Tyler where Wills was working the night shift. While Owens remained at their car, applicant and his son went to the fireworks stand. According to the accomplices, applicant shot Wills twice in the head at close range during the course of the robbery. The three men then disposed of some of the property taken in the robbery on their way to applicant's residence. After leaving the residence, the three men went to the Savoy Club and Alfredia [sic] Motel in Tyler. According to Owens, they arrived there at approximately 10:00 p.m. Applicant then went to his room at the Alfredia [sic] Motel where he took some heroin. According to the evidence at trial, applicant remained there the rest of the night and into the next morning.

On direct appeal, applicant contended there was insufficient evidence to corroborate the accomplice witness testimony. This Court found the following corroboration was sufficient: the independent evidence showed the accomplices and applicant were together shortly before and after the alleged time of the commission of the murder; this testimony placed the three men in the vicinity of the fireworks stand; the bullet fragments

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[1] According to the State's theory at trial, applicant committed the robbery-murder of Keith Wills while in the company of Edward Owens and Anthony Mitchell, applicant's son. Owens and Mitchell both testified for the State. In return Owens received a grant of immunity and Mitchell received a promise of ten years' punishment, probated.

removed from the deceased were fired from a .38 calibre weapon (the accomplices testified applicant shot Wills with a .38 calibre weapon that had a tendency to misfire); a witness stated that he saw a .38 calibre handgun in applicant's bedroom a few weeks after the murder; and the medical examiner, Dr. Gonzalez, testified that Wills was shot between the eyes (Owens testified that applicant told him that he shot Wills between the eyes). This Court held that this was sufficient evidence to corroborate the testimony of the accomplices Owens and Mitchell. *Mitchell v. State*, 650 S.W.2d at 804-809. However, there was no corroboration of the accomplices' account of the time of the killing of Wills.

In this habeas action, applicant asserted the State suppressed the testimony of Ralph East, a game warden who worked in Smith County at the time of the robbery-murder, and Kelly Stroud, a deputy sheriff with the Smith County Sheriff's Office. Applicant also argued there is a reasonable probability that the outcome of his trial would have been different if this evidence had not been suppressed. In light of the following facts, we find that we are in agreement with applicant that the statements of East and Stroud were suppressed, in apparent contravention of applicant's pre-trial motion for disclosure of all exculpatory evidence in the State's possession.

Ralph East began working as a State Game Warden in Smith County in 1974. On the evening of December 26, 1979, he was on duty near Troup, checking for poachers. Between 10:00 p.m. and midnight, after applicant had arrived at the Savoy Club, East left Troup to drive home on Highway 110. When he passed the fireworks stand where Keith Wills was working, he noticed that the lights

in the stand were turned on. "I noticed a light as if it was a television on and a person sitting behind the counter and I just looked at them and continued. That was all." When he testified at the evidentiary hearing, East was unable to identify the man who he saw sitting behind the counter.

On the morning of December 27, 1979, East was with Justice of the Peace Guthrie in her office in Smith County when a man and his son came in to report that there was a dead man at the fireworks stand. East and Judge Guthrie went to the stand to check out the accuracy of the report. Judge Guthrie remained in the car while East examined the scene. "When we got there, I walked up to the fireworks stand and looked over the counter and viewed the body laying there. . . . I seen a large hole between his eyes." The deceased wore a plaid shirt. East then returned to the car, parked it so that it blocked the driveway up to the fireworks stand, roped off the crime scene, and waited for the Sheriff's Office to arrive.

Deputy Sheriff Woody Woodhull showed up to handle the investigation. At the evidentiary hearing, East testified that he felt confident that he told Deputy Woodhull at the scene what he had seen the night before. "Nor did I talk to anybody except for Woody Woodhull. I feel very confident that I told him what time I was by there the night – on the 26th." At that time, no one requested that East file a written report regarding his observations of the night of the 26th.

After his conversation with Deputy Woodhull on December 27th, no one else connected with applicant's trial ever spoke with East about his observations of the

fireworks stand on the night of the 26th. The prosecutor who tried applicant for the capital murder of Keith Wills never spoke with East about what he saw on the night of the 26th. The next time East was asked about what he saw on the 26th was when he spoke with applicant's attorney on this writ application on the day before he testified at the evidentiary hearing. It appears that East's statements to Deputy Woodhull were never disclosed by Woodhull to the prosecutor or to applicant's trial counsel. The question of whether East's statements were exculpatory and material will be answered in the discussion of Kelly Stroud's offense report.

Kelly Stroud was a Deputy Sheriff in Smith County at the time of the capital murder of Keith Wills. In December, 1979, Stroud worked patrol duty for the Smith County Sheriff's Office. On December 26th and 27th, Stroud had the 3:00 to 11:00 p.m. shift. At approximately 10:15 p.m. on the 26th, the Sheriff's Office dispatched Stroud to Troup City Hall to investigate an assault. When he finished that call at 12:10 a.m., approximately three hours after applicant allegedly killed Wills and two hours after applicant arrived at the Savoy, Stroud returned to Tyler on Highway 110. Stroud checked in with dispatch and got a call back and time check of 12:15 a.m. He then made the following observation. "As I drove northbound on 110, I noticed that the fireworks stand was still open and observed one subject sitting inside the stand on the north end but did not notice anything unusual about it." Stroud observed that the man was sitting in a chair, that he was alive ("As far as I could tell."), and that he had a plaid shirt on. At the evidentiary hearing, Stroud stated

there was no question in his mind that the man sitting behind the counter was wearing a plaid shirt.

When Stroud arrived at the Sheriff's Office on December 27th to work the 3-11 shift, he learned of the murder at the fireworks stand. Stroud prepared a hand-written offense report because he thought what he had seen was important. "I would probably have turned it straight into C.I.D., Criminal Investigation Division." Stroud did not recall ever being talked to about his report after the 27th. He was confident in the accuracy of his report. On cross-examination, Stroud denied telling Deputy Woodhull that he was unsure if he had seen the man behind the counter on his trip to Troup, or on his return trip. On re-direct, Stroud emphasized his certainty that the man behind the counter was wearing a plaid shirt. He also explained that he mentioned the plaid shirt to applicant's counsel without prompting.[2]

The testimony at the evidentiary hearing established that neither Deputy Woodhull, nor anyone else in the Sheriff's Office, informed the prosecutors of Stroud's report. Jim Walker served as an Assistant District Attorney in Smith County until the month prior to the beginning of applicant's trial. Walker participated directly in the investigation of the murder of Wills. Walker did not recall being given, or seeing, Stroud's statement at any time. If he had been made aware of it, Walker testified

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[2] The matter of Stroud remembering the plaid shirt becomes more important in light of the trial court's finding at the evidentiary hearing that Stroud's veracity was dubious because Stroud failed to mention the plaid shirt in his written report on the 27th.

that he would have turned over a copy of it to applicant's trial counsel.[3] Jim Patterson succeeded Jim Walker as an Assistant District Attorney in Smith County. Patterson testified the first time that he saw Stroud's written statement was at the habeas evidentiary hearing. Patterson also testified that if he had seen it before the trial, he "probably would've given it to applicant's trial counsel."

We conclude that the statements of East and Stroud were not disclosed by the Smith County Sheriff's Office either to the prosecutors or to the defense counsel in applicant's case. From the testimony of Frank Henderson, Smith County Assistant District Attorney at the time of the evidentiary hearing, it appears that these statements were discovered for the first time by the District Attorney's Office when the trial court ordered him to examine the Sheriff's Office case files to search for exculpatory evidence. We find these statements were concealed by agents of the State, specifically, members of the Sheriff's Office, from the attorneys on both sides at applicant's 1981 trial. We must next resolve whether these statements were exculpatory and material.

This Court's recent decision in Thomas v. State, No. 0109-91 (Tex.Cr.App. October 28, 1992) controls resolution of this matter. This Court relies upon a three part test to

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[3] Instead, when the trial court considered applicant's motion for discovery prior to his 1981 trial, Walker informed the trial court "the state is unaware of any . . . exculpatory evidence at this time." At the evidentiary hearing, Walker explained that he never would have made that statement if he had known of the existence of Stroud's statement.

determine whether the State violated applicant's rights to due process under the Fourteenth Amendment:

> 1) Has there been a failure to disclose evidence?; (2) Is that evidence favorable to the accused?; and (3) Does that evidence create a probability sufficient to undermine the confidence in the outcome of the proceeding?

Thomas v. State, slip op., at 8. As our opinion above reflects, we have held that the State, through its agent, the Smith County Sheriff's Office, failed to disclose to defense counsel the statements and reports of Ralph East and Kelly Stroud.

The issue of favorability is controlled by deciding whether the evidence "if disclosed and used effectively, . . . may make the difference between conviction and acquittal." *Thomas v. State, supra;* and United States v. Bagley, 473 U.S. 667, at 676, 105 S.Ct. 3375, at 3380, ___ L.Ed.2d ___ (1985). Either exculpatory evidence or impeachment testimony can be favorable. The evidence provided by East and Stroud serves both purposes.

The evidence of East and Stroud is exculpatory because it "tends to . . . clear the defendant from alleged fault or guilt." *Thomas v. State*, slip op. at 8; and *Black's Law Dictionary*, p. 566 (5th ed.1990). In the instant case, the only evidence which tied applicant to the commission of the murder at 9:00 p.m. was the testimony of the accomplices. This time was critically important to the State's case, since the evidence adduced by the State at trial proved that applicant was at the Savoy Club and Alfredia [sic] Motel ingesting drugs and whoring from 10:00 p.m. on through the rest of the night. However, the

evidence from East and Stroud gave a strong indication that the victim may well have been alive from 10:00 p.m. until 1:00 a.m. The attorneys who prosecuted applicant in the instant case reached the same conclusion.

Jim Walker testified at the evidentiary hearing.

> "I think it is exculpatory. . . . I mean, as a prosecutor, if you have two witnesses that say a murder took place at 9:00 O'Clock at night but there is another witness that says it didn't happen until 1:00 O'Clock, that's exculpatory. It doesn't mean that all of them are being truthful or being correct. . . . It just means it's exculpatory and should be disclosed."

Walker also explained that his evidence showed applicant was at the Alfreda Motel doing heroin through the rest of the night and into the next morning. Walker believe that Stroud's evidence showed "the man was alive at a time when applicant was laid up in a hotel doing heroin."

Jim Patterson reached the same conclusion as Walker. In light of the specific testimony of applicant's accomplices, Patterson believed the evidence of East and Stroud was exculpatory from his perspective as a prosecutor. Patterson testified that if he had seen the written report of Stroud, he would have wanted to talk to Stroud because, "in view of the information that I had, it didn't make any sense."

We hold that the evidence of East and Stroud was exculpatory and that, in this sense, it was favorable to applicant. We also hold that this evidence qualified as impeachment evidence.

The testimony of East and Stroud would have impeached the testimony of the accomplices on the critical element of when applicant allegedly killed the victim. The above recitation of the evidence in the instant case supports this conclusion. The evidence of East and Stroud would have been favorable to applicant as impeachment evidence.

Lastly, we must resolve whether the evidence of East and Stroud created a probability sufficient to undermine the confidence in the outcome of the proceeding. In other words, was the evidence of East and Stroud material? *Thomas v. State*, slip op. at 9. In our effort to answer this question, we examined the evidence of East and Stroud in the context of the overall strength of the State's case. *Thomas v. State, Id.; United States v. Bagley*, 473 U.S., at 683, 105 S.Ct., at 3384; and *United States v. Agurs*, 427 U.S. 97, at 113, 96 S.Ct. 2392, at 2402 (1976).

If a verdict is only weakly supported by the record, it is more likely to be affected by the non-disclosure of favorable evidence, such as that of East and Stroud, than if it was strongly supported. *Thomas v. State*, slip op. at 9. In the instant case, the only evidence which established that applicant shot and killed the victim prior to the time he went to the Savoy Club and Alfredia [sic] Motel was the testimony of his accomplices.[4]

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[4] It is conceivable that evidence could have been presented by the State to corroborate the time of the victim's death. However, the actions of the investigators for the Smith County Sheriff's Office prevented the development of this evidence.

The medical examiner for Smith County, Dr. Gonzalez, performed an autopsy on the victim at 2:30 p.m. on the afternoon of

Texas statutory law historically casts accomplice witness testimony in an especially suspect light, in that it requires it to be corroborated by "other evidence tending to connect the defendant with the offense committed." TEX.CODE CRIM.PROC.ANN.art. 38.14 (1966); and Cast v. State, 296 S.W.2d 269, at 271 (Tex.Cr.App.1956) ("An accomplice witness is a discredited witness."). In the instant case, the corroboration offered by the State tended to connect applicant to the commission of the crime, but did so without corroborating the time that the accomplices said applicant shot and killed the victim. We conclude that the instant verdict, in light of the evidentiary support on the issue of the time applicant allegedly shot the victim, was likely to be affected by the non-disclosure of the exculpatory and impeaching evidence of East and Stroud.

In determining materiality, we also considered the potentially adverse affect that non-disclosure of East and Stroud's evidence had on the defense counsel's preparation and presentation of applicant's case. *Thomas v. State*, slip op. at 9. As previously noted, East and Stroud's evidence was exculpatory. Both of the Assistant District

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the 27th, the day after the victim was allegedly shot. At trial, he testified that the victim was killed within 24 hours of the time he conducted the autopsy.

At the evidentiary hearing, Dr. Gonzalez testified that there are more tests that he could have performed on the victim to determine a more precise time of death. However, he did not perform those tests. He explained that he did not fix a more precise time of death because he was not requested to do so by the representative of the Smith County Sheriff's Office who was present at the autopsy.

Attorneys who prosecuted the instant case concluded they would have disclosed this evidence to defense counsel if they had been aware of it. We hold that it was highly probably that the failure to disclose this evidence to defense counsel, as a result of the Sheriff's Office investigator's suppression of it, hampered defense counsel's efforts to prepare a defense which would have created a reasonable doubt that applicant could have been at the fireworks stand at the time the accomplice testified that the murder was committed.

Also, as previously noted, Stroud and East's evidence would have impeached the inherently suspect testimony of the accomplices. If it had been disclosed to defense counsel, he could have used it to controvert and impeach the accomplice's testimony. *Thomas v. State*, slip op. at 11. In this context, the failure to disclose the evidence hindered defense counsel's presentation of his case to the jury.

Because defense counsel's preparation and presentation of his case was adversely affected by the non-disclosure of East and Stroud's evidence, and because the verdict in the instant case was weakly supported on the issue of who killed the victim, and when that killing occurred, we hold that the failure to disclose this favorable evidence created a probability sufficient to undermine the confidence in the outcome of the instant trial. *Thomas v. State*, slip op. at 13. Applicant's right to due

process, by virtue of the Due Process Clause of the Fourteenth Amendment, was violated by the non-disclosure of this evidence. Applicant's 115th allegation is sustained.[5]

The judgment of the trial court is vacated and the applicant is remanded to the custody of the Smith County Sheriff to answer the indictment.

WHITE, Judge

(Delivered February 10, 1993)
En Banc
Publish
Maloney, J., not participating

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[5] Because we have granted applicant relief based upon the deprivation of his right to due process, there is no need to answer his allegation that the failure to disclose the evidence of East and Stroud deprived him of effective assistance of counsel.

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

April 14, 1993

241ST DISTRICT COURT-1-80-22-C

RE: Case No. 71,474
STYLE: MITCHELL, EX PARTE ANDREW LEE

On this day the State's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: JACK SKEEN JR
CRIMINAL DISTRICT ATTORNEY
403 SMITH COUNTY COURTHOUSE
TYLER TX 75702

APPENDIX "3"

93-1033

Supreme Court, U.S.
FILED
JUL 21 1993
OFFICE OF THE CLERK

NO. _____

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IN THE
Supreme Court Of The United States
OCTOBER TERM 1992

C. LOUIS NOACK and CAROLYN S. NOACK,
Petitioners,

v.

STATE FARM FIRE and CASUALTY COMPANY and JIMMY YOUNG,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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20 pp

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NO._____

IN THE

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OCTOBER TERM 1992

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Now come Petitioners and through the undersigned file this Supplemental Appendix to the Original Petition for Certiorari heretofore filed. Submitted herewith as Appendix "C" is the Memorandum Of The United States District Court Southern District Of Texas entered April 2, 1992.

Respectfully Submitted

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SUPPLEMENTAL
APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
APR 02 1992
Jesse E. Clark, Clerk
By Deputy: /s/ illegible

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. LOUIS NOACK AND	)	
CAROLYN S. NOACK	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIVIL ACTION**
	)	**NO. H-89-3335**
STATE FARM FIRE AND	)	
CASUALTY COMPANY	)	
	)	
Defendant.	)	

MEMORANDUM

Plaintiffs seek extra-contractual damages originating from an alleged delay in the processing and payment of their insurance claim. Pending before the Court is the Motion to Remand (Instrument No. 18) submitted by Plaintiffs C. Louis Noack and Carolyn S. Noack. Also pending before the court the Motion for Summary Judgment (Instrument No. 21) filed by Defendant Jimmy Young. Defendant State Farm Fire & Casualty Co. ("State Farm") joined in that motion on March

20, 1992. Having considered the motions, the responses, and the applicable law, this Court is of the opinion that plaintiffs' motion to remand should be denied inasmuch as a cause of action cannot lie against Jimmy Young, and that defendants motion for summary judgment should be granted.

I. STATEMENT OF FACTS

Plaintiffs bring this action in order to recover extra-contractual damages for breach of the common law duty of good faith and fair dealing and violations of the Texas Deceptive Trade Practices Act arising from the manner in which their claim for insurance proceeds was handled and resolved by State Farm.

This action was commenced on September 5, 1989, in the 190th Judicial District Court of Harris County, Texas. On September 28, 1989, State Farm timely removed the action, invoking this Court's diversity jurisdiction pursuant to 28 U.S.C. §1332. On October 17, 1990, plaintiffs were granted leave to amend their complaint. The amended complaint named Jimmy Young, primary adjuster for State Farm and a non-diverse party, as a defendant in the action. The plaintiffs subsequently filed a motion to remand. The defendants oppose the motion by maintaining that there has been a fraudulent joinder of Young to strip this Court of its diversity jurisdiction.

Young asserts that this action should not be remanded in that no cause of action can be asserted against him in state court in light of the fact that the two year statute of limitations period has run before he was named as a party to this action. Young contends that assuming *arguendo* that the limitations period has not run the plaintiffs have no cause of action against him inasmuch as they signed a release settling all their claims against State Farm and its adjusters.

Plaintiffs reply insisting that this Court must remand the action because it has no jurisdiction to determine whether a cause of action exists against Young.

This Court will first determine whether a fraudulent joinder has occurred; necessary to that decision is a determination of whether plaintiffs have a valid cause of action against Young. Therefore this Court must determine whether a possibility of recovery exists against Young. If no cause of action can lie against Young because of a purported release signed by the plaintiffs this Court has and may issue a ruling the defendants' motion for summary judgment.

II. DISCUSSION

1. *Fraudulent Joinder*

A. Standard of Review

The doctrine of "fraudulent joinder" was a judicial pronouncement intended to protect non-resident defendants from any misstatement of facts, misjoinder of parties, or causes of action knowingly made by plaintiffs for the purpose of conferring jurisdiction upon or defeating removal to the Federal Court. *Bentley v. Halliburton Oil Well Cementing Co.*, 174 F.2d 788 (5th Cir. 1949). The burden of proving fraudulent joinder in support of a petition for removal is a heavy one, and the removing party must prove that there is absolutely no possibility that plaintiff will be able to establish a cause of action against the in-state defendant in state court, or that there has been outright fraud in plaintiff's pleadings of jurisdictional facts. *Green v. Amerada Hess Corp.*, 707 F.2d 201 (5th Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984).

Where the removing party grounds its allegations of fraudulent joinder upon the theory that the plaintiff cannot recover from the in-state defendants as a matter of law, the Fifth Circuit has set out the standard to be applied:

> The district court must then evaluate all of the factual allegations in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of the plaintiff ..... Moreover, the district court must resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff ..... If, having assumed all of the facts set forth by the plaintiff to be true and having resolved all uncertainties as to state substantive law against the defendants, the district court should find that there is no possibility of a valid cause of action being set forth against the in-state defendant(s), only then can it be said that there has been a "fraudulent joinder."

B., Inc. V. Miller Brewing Co., 663 F.2d 545, 549-50 (5th Cir. 1981) (citations omitted).

The Court should not premise the issue of fraudulent joinder on the probability of plaintiff's prevailing on the merits, but only look for the "modicum of sturdiness" for the possibility of recovery. *See generally Green v. Amerada*, 707 F.2d at 204-05. If that possibility exists, then "a good faith assertion of such an expectancy in a state court is not a sham ... and is not fraudulent in fact or in law." *B., Inc. v. Miller Brewing Co.*, 663 F.2d at 550 (quoting *Bobby Jones Garden Apartments v. Suleski*, 391 F.2d 172, 177 (5th Cir. 1968)). Therefore, for there to exist a fraudulent

joinder the Court must find that absolutely no possibility of recovery remains against the in-state defendant Mason. *See generally Green v. Amerada*, 707 F.2d at 206. In other words, for the doctrine of fraudulent joinder to apply

> [I]t [must] be clear that there can be no recovery under the law of the state on the cause alleged, or on the facts in view of the law as they exist when the petition for remand is heard.

Parks v. New York Times Co., 308 F.2d 474, 478 (5th Cir. 1962), *cert. denied*, 376 U.S. 949 (1964).

2. *The Applicable Law*

Under Texas law, insurance policies are to be liberally construed in favor of the insured, any uncertain language is to be interpreted to avoid forfeiture or diminution of a policy's benefits. *Travelers Indem. Co. of Rhode Island v. Lucas*, 678 S.W.2d 732 (Tex.App. -- Texarkana 1989, no writ).

An insurance company may violate its common law duty of good faith and fair dealing by failing to promptly pay a claim when liability becomes reasonably clear. *Vail v. Texas Farm Bureau Mutual Insur. Co.*, 754 S.W.2d 129, 135 (Tex. 1988); *Aranda v. Insur. Co. of North America*, 748 S.W.2d 210, 212-13 (Tex. 1988). A cause of action for breach of that duty exists where there is no reasonable basis for a denial of a claim or when the insurer fails or delays to determine whether there is any reasonable basis for a denial of the claim. *Arnold v. National County Mutual Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) *modified on other*

grounds Murry v. San Jacinto Agency, 800 S.W.2d 826, 829 (Tex. 1990) (limitations holding modified). In order to sustain a claim for breach of good faith, the insured must establish (1) the absence of a reasonable basis for denying or delaying payment of the claim and (2) that the insurer knew, or should have known, that there existed no reasonable basis for denying or delaying payment of the claim. *Aranda v. Insur. Co. of North America*, 748 S.W.2d at 213.

Violations of a duty of good faith and fair dealing may also constitute a violation of §17.46 of the Texas Deceptive Trade Practices Act and article 21.21, §16 of the Texas Insurance Code. *Vail*, 754 S.W.2d at 131-35, 147; *Allied General Agency, Inc. v. Moody*, 788 S.W.2d 601, 604 (Tex. App. --Dallas 1990, writ denied).

In order to determine what inferences can be drawn from a delay and refusal to pay, the court must look at the circumstances that surround the matter. A failure to pay after sufficient time for an investigation has taken place can only be evidence of malice or gross negligence if the failure is arbitrary and capricious. However, if a genuine controversy existed, "this will suffice as a reason for the failure of the insurer to make prompt payment. *Nat. Union Fire Ins. v. Hudson Energy*, 780 S.W.2d 417, 426 (Tex. App. --Texarkana 1989), *aff'd* 811 S.W.2d 552 (Tex. 1991) (citing *McCauley v. Boston Old Colony Ins. Co.*, 256 S.E.2d 19 (Ga.Ct.App. 1979)).[1]

a. standing

Plaintiffs have no standing to bring this action.

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[1]Although, this Court believes that a genuine controversy existed the Court makes no ruling on this point, rather, this Court's determination is limited to those grounds stated below.

The plaintiffs to this action signed two releases dated June 14, 1988 and August 3, 1988. Harmonizing the terms of those releases [2] this Court is compelled to find that the right of action was conveyed without reservation. This decision stems from the plain language of the release agreement. *See* Def.'s Mot. for Summ. J. Ex. C at p. 7.[3]

b. Limitations

On September 18, 1989, plaintiffs initiated action in state court arising from the insurers dilatory processing of insurance claims stemming from a fire of October 14, 1987.

On June 14, 1988, plaintiffs executed a "Release In Full" settling all of their claims against State Farm and its adjusters. On August 3, 1988 plaintiffs executed a settlement of all claims or potential claims against State Farm and its adjusters except for "Additional Living Expenses." Plaintiff's argue that the releases of June 14 and August 3 are not all encompassing releases in that State Farm presented them with a release on August 1, 1988, which they failed to execute. The release specifically dealt with the release of any extra-contractual, tort and DPTA claims.

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[2]A thorough review of the relevant releases is had below.

[3]Plaintiffs have not raised the allegation of fraud in the inducement or claim of duress with respect to the release. Plaintiff cannot attempt to raise those claims now as any delay in raising those claims is fatal. The United States Supreme Court has noted that the duress defense must be raised soon after the coercion is applied; in a case involving a negotiated agreement between parties represented by counsel the delay is itself compelling evidence that there was in fact no duress. *See Louisiana-Pacific Corp. v. United States*, 656 F.2d 650, 653 (Ct. Cl. 1981) (citing *Silliman v. United States*, 101 U.S. (11 Otto) 465 (1879)).

For limitations purposes, a cause of action accrues at the time when facts come into existence which authorize a claimant to seek judicial remedies, *Murry v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990) (citing *Robinson v. Weaver*, 550 S.W.2d 18, 19 (Tex. 1977)). or when an insurance company denies a claim the cause of action appropriately begins to run at denial. *Murry v. San Jacinto Agency, Inc.*, 800 S.W.2d at 828-829. However, if an insurance company "strings" an insured along without denying or paying a Claim, limitations will be tolled. *Murry v. San Jacinto Agency, Inc.*, 800 S.W.2d at 828 n.2. In the case at hand, although it may be argued that plaintiffs were strung along, that activity ceased when all but claims for additional living expenses were settled on August 3, 1988. Young was not on notice that he could be a party to this action until September 13, 1990, more than two years after a cause of action against him accrued. *Murry v. San Jacinto Agency, Inc.*, 800 S.W.2d at 827. The action against Young is barred.

There exists an additional, independent reason for the denial of the motion to remand.

c. Release and Settlement

Settlement releases apply to almost any action. *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1310 (5th Cir. 1983). A adequately drawn release will bar an action. *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d at 1313 (citations omitted).

The release of June 14, 1988, stated in relevant part:

> WHEREAS, acceptance of this release and payment of the consideration hereunder are

> merely a compromise and settlement agreement of disputed claims which have been made or *which might otherwise hereafter be made* by Clarence Louis Noack, Jr. and Carolyn Noack ... against State Farm regarding the contents loss, by which State Farm is *forever buying* its peace as to claims or potential claims of Clarence Louis Noack, Jr. and Carolyn Noack for contents loss.
>
> * * *
>
> ... Clarence Louis Noack, Jr. and Carolyn Noack... fully RELEASE ... State Farm ... as well as [its] adjusters ... from, and against all claims, demands, rights, and causes of action whatsoever nature which Clarence Louis Noack, Jr. and Carolyn Noack have or may have for themselves ....
>
> * * *
>
> ... to the extent that Clarence Louis Noack, Jr. and Carolyn Noack have any remaining claims, cause, or causes of action relating to or *arising from, directly or indirectly*, the contents loss, *all such remaining claims are hereby fully and forever CONVEYED, SOLD, TRANSFERRED, and ASSIGNED to State Farm*, without reservation, for the consideration heretofore recited.

Def.'s Mot. for Summ. J. Ex. B at pp. 2-6 (italics supplied, emphasis original).

The release dated August 3, 1988, recited essentially the same terms as the release of June 3 but allowed the Noacks to retain a claim for "Additional Living Expenses" should they so desire. Def.'s Mot. for Summ. J. Ex. B at p. 2.

Plaintiffs assert the notion, supported only by parol evidence, that if the parties intended for the June 14th release to be all encompassing, then State Farm would not have asked plaintiffs to sign the more specific release on August 1, 1988, or allowed them to seek compensation for "Additional Living Expenses" under the release of August 3, 1988.

The Noacks claim that the release of August 1 went unsigned specifically because it contained language barring an action for breach of good faith duty and for violations of the DPTA. The plaintiffs argue that this establishes that both State Farm and the plaintiffs had no intention to relinquish their rights to other causes of action. The plain terms of the releases of June 14 and August 3 clearly demonstrate that the Noacks released and conveyed the right to bring further actions.

These plaintiffs' arguments are unpersuasive. This Court cannot impose a liability on State Farm after valid releases were executed. State Farm merely attempted to bolster its position or executed the additional release in order to accommodate an opposing party. The terms of the August 3 release state that it is "merely a compromise and settlement" and that was "in no way an admission of ... liability." Def.'s Mot. for Summ. J. Ex. C at pp. 1-2.[4]

Moreover, the terms of the releases dictate this result. Texas law is clear. "The courts will enforce an unambiguous instrument as written; and in an ordinary case, the writing alone will be deemed to express the intention of

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[4]**Plaintiffs' argue, although not stated as such, that there was a waiver of the first release. In order to be valid, however, the waiver must be a knowing waiver; the language of the release supports this Court's finding that there was no waiver of the June 14th release.**

the parties." *Sun Oil Company (Delaware) v. Madeley*, 626 S.W.2d 726, 728 (Tex. 1981). *See also Cherokee Water Company v. Forderhause*, 641 S.W.2d 522 (Tex. 1982);

Aetna Life and Casualty Company v. Gunn, 628 S.W.2d 758 (Tex. 1982).

If a contract has certain and definite meaning then it is not ambiguous and the Court must construe the contract according to its terms. *Coker v. Coker*, 650 S.W.2d 391 (Tex. 1983). This Court must ascertain the true intentions of the parties as expressed in the instrument. *Id.*

The admission of explanatory extrinsic evidence depends on whether the court finds as a matter of law that a written instrument is ambiguous. *Isbell v. Williams*, 738 S.W.2d 20, 24 (Tex.App. --Texarkana 1987, writ ref'd n.r.e.); *Reilly v. Rangers Management, Inc.*, 727 S.W.2d 527, 527 (Tex. 1987); *O'Shea v. Coronado Transmission Co.*, 656 S.W.2d 557, 561 (Tex.App. --Corpus Christi 1983, writ ref'd n.r.e.).

The interpretation of a contract becomes a fact issue for the jury only when, after application of the pertinent rules of construction, there remains a genuine uncertainty as to which of two meanings is proper. *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979). This is so as Texas courts have repeatedly declared that the question of whether a contract is ambiguous is one of law for determination by the court. *See e.g., R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518-19 (Tex. 1980); *Coker v. Coker*, at 394.

There are other meanings of ambiguity. A contract may be ambiguous if its meaning is "uncertain and doubtful." *Skyland Developers v. Sky Harbor Associates*,

586 S.W.2d 564, 568 (Tex.Civ.App. -- Corpus Christi 1979, no writ); *Walter E. Heller & Co. v. Allen*, 412 S.W.2d 712, 718 (Tex.Civ.App.-- Corpus Christi 1967, writ ref's n.r.e.) (guarantor liability). A written instrument may be ambiguous if it is "difficult to comprehend or distinguish, [or] of doubtful import," as there is "doubt as to [its] true meaning." *See San Antonio Life Insurance Co. v. Griffith*, 185 S.W. 335 (Tex.Civ.App. -- Fort Worth 1916, no writ); *O'Shea v. Coronado Transmission Co.*, 656 S.W.2d at 561; *see also Goff v. Southmost Sav. & Loan Ass'n*, 758 S.W.2d 822, 825 (Tex.App. -- Corpus Christi 1988. writ denied).

The principal purpose of contract construction is to ascertain the intentions of the parties. Therefore, contracts must be construed from a "utilitarian standpoint bearing in mind the particular business activity sought to be served ..." *Neece v. A.A.A. Realty Co.*, 322 S.W.2d 597, 602 (Tex. 1959); *see also Skyland Developers v. Sky Harbor Associates*, 586 S.W.2d at 570.

Courts must give effect to the objective, not subjective, intent of the parties as it is expressed in writing, as that intent control the contract's construction. *Westwind Exploration, Inc. v. Homestate Sav. Ass'n*, 696 S.W.2d 378 (Tex 1985).

This Court must harmonize and give effect to all the provisions of the contract so that none of the writing will be meaningless. *Chapman v. Orange Rice Milling Co.*, 747 F.2d 981, 983 (5th Cir. 1984); *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 158 (Tex. 1951). If the provisions in the contract appear to conflict, they should be adapted to reflect the true intentions of the parties. *Ogden v. Dickenson State Bank*, 662 S.W.2d 330, 332 (Tex. 1983). This Court must give weight to each portion of the contract unless there is an irreconcilable conflict. *Id.* Moreover, no

single provision taken alone will be given controlling effect; rather, all provisions must be considered with reference to the whole instrument. *Coker v. Coker*, 650 S.W.2d at 393;

Bush v. Brunswick Corp., 783 S.W.2d 724, 728 (Tex.App. -- Fort Worth 1989, writ denied).

Both releases, and in particular the later release, contained language that unambiguously states that State Farm is "forever buying the peace as to all claims or potential claims." Even without reference to specific claims the language of the release clearly denotes that State Farm would be released from all potential claims. This suit is clearly barred under the terms of the release.

A releasor cannot complain that he or she was ignorant of, or mistaken about the contents of the release, or failed to read it before signing where the signed release itself clearly states that it was read and understood by the releasor. *See Torchia v. Aetna Cas. & Sur. Co.*, 804 S.W.2d 219, 222-24 (Tex.App. -- El Paso 1991, writ denied) (facts similar to the case at hand, claimant released insurer and court determined settlement was fair.)

Clearly, plaintiffs do not have a valid cause of action against Jimmy Young; plaintiffs' motion to remand should be denied. This Court will not address the defendants' motion for summary judgment.

2. Summary Judgment

A. *Standard of Review*

Rule 56(c) provides that "[summary] judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Williams v. Adams*, 836 F.2d 958, 960 (5th Cir. 1988). The burden is not on the movant to produce evidence showing the absence of a genuine issue of material fact. *See International Ass'n of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co.*, 812 F.2d 219, 222 (5th Cir. 1987). A defendant who moves for summary judgment may rely on the absence of evidence to support an essential element of the plaintiff's case. *Id.*

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *See Celotex*, 477 U.S. at 324-25. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). Assertions unsupported by facts are insufficient to oppose a notion for summary judgment. *Williams v. Weber Management Serv.*, 839 F.2d 1039, 1041 (5th Cir. 1987). There must be evidence giving rise to reasonable inferences that support the nonmoving party's position. *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987). Bare or mere

allegations are insufficient. *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 79 (5th Cir. 1987).

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden *Anderson*, 477 U.S. at 254. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 254. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is inappropriate if the evidence before the court, viewed as a whole, could lead to different factual findings and conclusions. *Honore v. Douglas*, 833 F.2d 565. 567 (5th Cir. 1987).

2. The Applicable Law

In light of this Court's interpretation of the relevant settlement and release agreements this Court concludes, for the reasons set forth above, that plaintiffs do not have standing to sue in this matter having conveyed that right to State Farm.

Additionally, the release agreement was effective against all potential claims that could be raised, this broad terminology plainly applies to claims arising in tort and under the DPTA. Defendants' motion for summary judgment should be granted.

III. CONCLUSION

This Court, having considered the other contentions presented concludes, for the reason set forth above, that plaintiffs' motion to remand should be denied and that defendants' motion for summary judgment should be granted. Any other motions before the Court are now MOOT.

Signed at Houston, Texas, this 31st day of March, 1992.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

Respectfully submitted,